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IN THE
COURT OF APPEALS OF INDIANA

DAVID KIRK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A04-0603-CR-128
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Mark McIntosh, Judge
Cause No. 35C01-0502-FA-13

March 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

David Kirk appeals his conviction for child molesting as a class C felony.[1] Kirk raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Kirk; and

II. Whether Kirk's sentence is appropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. Between the years of 1998 and 2002, Kirk lived in Huntington, Indiana with his wife, Sandra, and their two children, A.K. and D.K. A.K. was born on June 6, 1989. From the time that A.K. was age seven or eight until the year 2002, Kirk fondled and touched A.K.'s vaginal area with his hand and fingers with the intent to arouse or satisfy his own sexual desires.

On February 10, 2005, Kirk was arrested and charged with child molesting as a class A felony[2] and child molesting as a class C felony. On January 13, 2006, Kirk and the State entered into a plea agreement. Under the terms of the plea agreement, Kirk pleaded guilty to child molesting as a class C felony and the State agreed to dismiss the remaining charge. The plea also provided that any executed sentence would be capped at four years. The trial court accepted the plea agreement.

At the sentencing hearing, the trial court stated:

> In sentencing [Kirk] the Court has considered the factors made mandatory by statute as follows: One, the risk that [Kirk] will commit another crime[;] two, the nature and circumstances of the crime committed[;] three, [Kirk's]

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[1] Ind. Code § 35-42-4-3(b) (2004).

[2] Ind. Code § 35-42-4-3(a) (2004).

> prior criminal record, character and condition. The statements made by the victims. The Court finds the following aggravating factors: Certainly he violated a position of trust. There is absolutely no question that he's continued to live with the children. The Court finds that bothersome. The Court finds that [Kirk] did not begin counseling until after he had pled guilty but maintained his innocence for a period of almost ten month [sic]. The Court finds the following mitigating factors: That [Kirk] did plead guilty, that he does have a family that he's trying to support and I will agree without a question, he's remorseful. The court considers the balance between the aggravating and the mitigating to be off set and the Court now sentences [Kirk] to a term of four years with two years suspended. I meant, I did that wrong and I'm sorry. I'm finding the favor of the aggravating and I give him four years plus two. Then I'll suspend the two. [Kirk] shall serve the two years on probation and be required to attend and complete sex offender counseling. [Kirk] shall be ordered to pay restitution in the amount to be determined by the Court and that would be when you know if the counseling or the spending money, I don't know. Have no contact with the victim or any child under eighteen years of age. I don't, I would like you to place in the aggravating cause [sic] I didn't say it, the deep and profound impact on the child that will affect her for the rest of her life.

Transcript at 103-104.

I.

The first issue is whether the trial court abused its discretion in sentencing Kirk. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion.[3] Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998).

[3] Though not raised as an issue by the parties, we note that Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Kirk committed his offenses prior to the effective date and was sentenced on February 13, 2006. Neither party argues that the amended sentencing statutes should be applied. Consequently, we will apply the version of the sentencing statutes in effect at the time Kirk committed his offense. Moreover, the application of the amended sentencing statute would not change the result here.

"We give great deference to a court's determination of the proper weight to assign to aggravating and mitigating circumstances, and the appropriateness of a sentence, which is in the court's discretion." Losch v. State, 834 N.E.2d 1012, 1014 (Ind. 2005). "We will set aside a court's weighing only upon the showing of a manifest abuse of discretion." Id.

Kirk argues that the trial court abused its discretion by considering an improper aggravator in determining his sentence. Specifically, Kirk argues that the trial court abused its discretion by considering "the deep and profound impact on [A.K.] that will affect her for the rest of her life" as an aggravator. Appellant's Brief at 6. We note that the State conceded in its brief that the trial court's reliance on this aggravating factor was improper.[4] Nevertheless, the State argues that "the fact that one aggravating factor is improperly applied does not invalidate the sentence if other valid aggravators exist and the invalid aggravator did not play a significant role in the trial court's decision." Appellee's Brief at 5.

"Even when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist." Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). However, we note that "the existence of an aggravator does not relieve trial or appellate judges from the obligation to consider what weight to assign a particular aggravator and to balance the aggravators and mitigators." Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005). "Where a trial court has used an erroneous aggravator,

[4] Because the State concedes this issue, we will not discuss whether consideration of the impact on the child was an improper consideration by the trial court.

. . . the court on appeal can nevertheless affirm the sentence if it can say with confidence that the same sentence is appropriate without it." Witmer v. State, 800 N.E.2d 571, 572-573 (Ind. 2003).

The State argues, and we agree, that "[t]he trial court added this aggravating circumstance as an afterthought after it imposed the sentence." Appellee's Brief at 6. At the sentencing hearing, the trial court stated the aggravating and mitigating circumstances and imposed the six-year sentence with four years executed and two years suspended on Kirk. Only after this did the trial court add the 'deep and profound impact' factor as an aggravator. Therefore, we find that it is not likely that this factor played a significant role in the trial court's sentencing decision.

At the sentencing hearing, the trial court found three other aggravating circumstances that Kirk does not challenge.[5] The trial court found that Kirk abused his position of trust by molesting his daughter, A.K. Abuse of a position of trust has been found by Indiana courts to be enough to justify a trial court imposing the maximum enhancement of a sentence for child molesting. Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) (citing Singer v. State, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996). "There is no greater position of trust than that of a parent to his own young child." Id. In addition to this aggravator, the trial court found that Kirk continued to live with his children

[5] "Kirk does not dispute that violating a position of trust may be used to enhance a sentence. Kirk also does not dispute that continuing to live with some of his children and his beginning counseling after the date of guilty plea may properly be considered as part of the character of the offender, a mandatory sentencing consideration pursuant to Ind. Code § 35-38-1-7.1(a)(3)(B)." Appellant's Brief at 7 (internal citations omitted).

following his arrest and he did not begin counseling until after he had pleaded guilty ten months after being charged. The trial court properly considered these factors and Kirk does not appeal them here.

It appears the trial court did not give significant weight to the cited mitigators. The trial court found that Kirk's guilty plea was a mitigator in this case. The Indiana Supreme Court has found that a defendant's guilty plea extends a substantial benefit to the State and a defendant should be extended a substantial benefit in return because "[a] guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial." Francis v. State, 817 N.E.2d 235, 237 (Ind. 2004). Here, Kirk reaped a substantial benefit when he pleaded guilty. Kirk only pleaded guilty to child molesting as a class C felony, while the State dropped the charge for child molesting as a class A felony. Further, the terms of the plea agreement called for a sentencing cap of four years executed. In addition, the State bore the expense of preparing for trial on all the charges for months because Kirk did not enter his guilty plea until ten months after being charged. The trial court also determined that Kirk's remorse was a mitigator. "It was certainly proper for [Kirk] to show remorse, and the court did find this as a mitigator." Covington v. State, 842 N.E.2d 345, 348 (Ind. 2006). However, this does not require the trial court to conclude that Kirk's remorse outweighs the crime he committed against his child, A.K. Id. Lastly, the court found Kirk's attempt to support his family was a mitigator. However, it is possible that this factor received minimal weight considering Kirk's sporadic child support payments and arrearage at the time of sentencing.

Despite the trial court's consideration of one improper aggravator as an afterthought, three significant aggravators and three relatively minor mitigators remain. Under these circumstances, the trial court's error in considering the "deep profound impact on [A.K.]" as an aggravator was harmless, inasmuch as we can say with confidence that the trial court would have imposed the same sentence even if it had not considered the improper aggravating circumstance. See, e.g., Holden v. State, 815 N.E.2d 1049, 1059 (Ind. Ct. App. 2004) (holding that complained of aggravator did not contribute to the defendant's sentence).

II.

The second issue is whether Kirk's sentence is inappropriate in light of his character and the nature of the offense. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Our review of the nature of the offense reveals that Kirk, from 1998 until 2002, molested his own daughter, A.K., with whom he lived along with his wife and son. A.K., at the time the molestation began, was only seven or eight years old. Kirk fondled and touched A.K.'s vaginal area with his hand and fingers with the intent to arouse or satisfy his own sexual desires. Kirk only stopped this behavior when his wife found a note, written by A.K., to A.K.'s pastor discussing Kirk's behavior. Our review of the character of the offender reveals that Kirk has no criminal history aside from the present offense. However, he embarked on a course of conduct involving molestation of his biological

daughter, A.K. This behavior persisted for approximately five years. By molesting his own child, Kirk violated a position of trust that exists between a parent and a child. See, e.g., Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) (holding that "there is no greater position of trust than that of a parent to his own young child"). After due consideration of the trial court's six-year sentence with two years suspended, we conclude that Kirk's sentence is not inappropriate. See, e.g., Laux v. State, 821 N.E.2d 816, 823 (Ind. 2005) (holding that in light of all the circumstances surrounding the defendant's crime, the court could not conclude that defendant's sentence was inappropriate).

For the foregoing reasons, we affirm Kirk's sentence for child molesting as a class C felony.

SULLIVAN, J. and CRONE, J. concur